

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
IMAGING MANAGEMENT SERVICES OF AMERICA, INC.	:	DETERMINATION
	:	DTA NO. 816563
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1993 through 1995.	:	

Petitioner, Imaging Management Services of America, Inc., 37-61 87th Street, Jackson Heights, New York 11372, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 1993 through 1995.

On June 14, 1999 and June 23, 1999, respectively, petitioner, appearing by its Controller, Stephen Sherman, and the Division of Taxation appearing by Barbara G. Billet, Esq. (Michael J. Glannon, Esq., of counsel) consented to have the matter determined on submission without a hearing. The Division of Taxation was given until March 9, 2000 to comment upon the documents submitted by petitioner, which date began the six-month period for the issuance of this determination. After review of the entire record, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation correctly determined that Imaging Management Services of America, Inc. improperly failed to deduct and remit withholding taxes to New York

State and New York City with respect to compensation paid to its president during the years at issue.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) conducted an audit of Imaging Management Services of America, Inc. (“Imaging Management”) for the years 1993 through 1995. Eric Hagerbrant owned the outstanding stock of Imaging Management and held the title of president.

2. In the course of the audit, the Division found that rather than issuing W-2 Forms to Mr. Hagerbrant, the corporation issued Forms 1099 without withholding income taxes. This practice prompted the Division to examine whether Mr. Hagerbrant filed and paid New York State personal income tax. The Division found that Mr. Hagerbrant filed New York State personal income tax returns and paid taxes for the years 1994 and 1995. However, he did not file a New York State personal income tax return for the year 1993.

3. The Forms 1099 filed by Imaging Management reported that Mr. Hagerbrant received nonemployee compensation of \$232,570.00, \$250,500.00 and \$312,500.00, respectively, in the years 1993 through 1995.

4. On the basis of the foregoing, the Division issued a series of notices of deficiency, dated March 24, 1997, which asserted deficiencies of New York State withholding tax as follows:

<u>Period</u>	<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Balance Due</u>
01/03/93-12/03/93	\$18,605.04	\$6,879.56	\$9,021.33	\$34,505.93
01/03/94-12/03/94	0.00	1,712.28	0.00	1,712.28
01/08/94-06/25/94	0.00	2,047.91	0.00	2,047.91

5. The Division also issued a series of notices of deficiency, dated March 24, 1997, which asserted a deficiency of New York City withholding tax as follows:

<u>Period</u>	<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Balance Due</u>
01/03/93-12/03/93	\$1,047.00	\$387.14	\$1,292.88	\$2,727.02
01/03/94-12/03/94	0.00	95.96	0.00	95.96
01/03/95-12/03/95	0.00	117.00	0.00	117.00

6. The penalties imposed for the year 1993 were asserted pursuant to Tax Law § 685(a)(1) for failure to file a return and Tax Law § 685(b) for negligence. For the remaining years in issue, the amount of interest asserted to be due was based on the tax due on the amounts reported as “DIST FROM SUBS” which was reported on Mr. and Mrs. Hagerbrant’s New York State nonresident and part-year resident income tax returns for the years 1994 and 1995. For the latter two years in issue, Mr. Hagerbrant and his wife reported \$250,500.00 and \$312,500.00, respectively, as “DIST FROM SUBS.” These amounts corresponded with the amounts reported on Forms 1099-MISC for 1994 and 1995 as nonemployee compensation.

7. A banking resolution, dated July 9, 1992, gave Eric Hagerbrant the authority to act on the account of Imaging Management Services of America, Inc. The form listed Mr. Hagerbrant’s title as president.

A Certificate of Amendment of Certificate of Incorporation of RMI Associates, Inc. filed on June 23, 1992 changed petitioner’s corporate name from RMI Associates Inc. to Imaging Management Services of America, Inc. The fifth paragraph of this document stated that it was authorized by the written consent of the sole director and shareholder. The document is signed by Eric Hagerbrant as president, secretary and sole incorporator.

8. The Internal Revenue Service advised petitioner on July 5, 1993, that its election to be treated as a S-corporation had been accepted.

Petitioner's Election by a Small Business Corporation, dated July 27, 1992, named only Mr. Hagerbrant as a shareholder. The form was signed by Mr. Hagerbrant as president.

The form CT-6, entitled Election by a Federal S Corporation to be Treated as a New York S Corporation, also listed only Mr. Hagerbrant's name as shareholder. Mr. Hagerbrant signed this form as president as well.

CONCLUSIONS OF LAW

A. Tax Law § 671(a)(1) requires every employer maintaining an office or transacting business in the State and making payment of any taxable wages to a resident or nonresident, to deduct and withhold a tax in an amount substantially equal to the tax reasonably estimated to be due from the employee's New York adjusted gross income or New York source income received during the calendar year. The method of determining the amount to be withheld is prescribed by regulations issued by the Commissioner (*see*, 20 NYCRR 171, et seq.). The New York City Administrative Code contains similar provisions with respect to the withholding of New York City personal income tax and nonresident earnings tax (*see*, Administrative Code §§11-1771, 11-1775, 11-1776, 11-1908, 11-1913, 11-1914).

B. Section 675 of the Tax Law provides that every employer required to deduct and withhold tax under Article 22 is liable for such tax (*see also*, Administrative Code §§ 11-1775, 11-1913). Tax Law § 676 further provides that if an employer fails to deduct and withhold tax as required, and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer, but the employer

shall not be relieved from liability for any penalties, interest or additions to the tax otherwise applicable for such failure to deduct and withhold (*see also*, Administrative Code §§ 11-1776, 11-1914).

C. The record establishes that Mr. Hagerbrant was petitioner's president. Petitioner's controller argues that bills from individuals and organizations made Mr. Hagerbrant an independent contractor or a consultant. This position is erroneous. As set forth above, certain employers are required to deduct and withhold tax from the wages of its employees. For purposes of this provision, the definition of employer and employee as set forth in the Internal Revenue Code and its applicable regulations apply for New York State personal income tax purposes (20 NYCRR 171.1[b]). Section 3121(d)(1) of the Internal Revenue Code expressly provides that the term "employee" means "any officer of a corporation." It follows that since Mr. Hagerbrant was an employee, petitioner should have been deducting and withholding taxes from the wages paid to him.

D. The petition of Imaging Management Services of America, Inc. is denied and the notices of deficiency, dated March 24, 1997, are sustained together with such penalties and interest as may be lawfully due.

DATED: Troy, New York
August 31, 2000

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE